

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 23-cr-80101-AMC

UNITED STATES OF AMERICA, Fort Pierce, Florida
Plaintiff, June 25, 2024

vs.

1:06 p.m. - 2:38 p.m.

DONALD J. TRUMP, WALTINE NAUTA, CARLOS
DE OLIVEIRA,

Defendant. Pages 1 to 81

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Honorable Aileen M. Cannon
18 United States District Court
Fort Pierce, Florida

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1 (Call to the order of the Court.)

2 THE COURT: Good afternoon. Please be seated. This is
3 Case Number 23-80101, United States of America v. Donald J.
4 Trump, Waltine Nauta, and Carlos De Oliveira.

5 We were in session, previously, in a sealed format. So
6 to get us started, let's get appearances again.

7 Mr. Bratt.

8 MR. BRATT: Good afternoon, Your Honor. Jay Bratt,
9 David Harbach, and Michael Thakur and John Pellettieri on
10 behalf of the United States.

11 THE COURT: Thank you.

12 Mr. Bove.

13 MR. BOVE: Good afternoon, Your Honor. Emil Bove,
14 Todd Blanche, Kendra Wharton, and Lazaro Fields for President
15 Trump, who is not here today, with leave of the Court.

16 THE COURT: Thank you.

17 Mr. Woodward or Ms. Dadan.

18 MS. DADAN: Sasha Dadan on behalf of Waltine Nauta,
19 along with Stanley Woodward, co-counsel.

20 THE COURT: Thank you.

21 MR. IRVING: Good afternoon, Your Honor. John Irving
22 and Donnie Murrell on behalf of Mr. De Oliveira.

23 THE COURT: Thank you.

24 All right. As I indicated a moment ago, we had a
25 sealed session to discuss certain presumptively privileged

1 material and, also, Grand Jury material stemming from Defendant
2 Trump's motion to suppress at docket entry 566.

3 We are now going to hear argument starting from --
4 Mr. Bove, are you going to be handling this portion as well --

5 MR. BOVE: Yes, Judge.

6 THE COURT: -- on the remaining aspects of that motion,
7 which include Defendant Trump's arguments with respect to his
8 entitlement to a Franks hearing, based on alleged
9 misrepresentations or material omissions in the search warrant
10 affidavit, and also arguments related to the alleged lack of
11 particularity of the warrant under the Fourth Amendment and the
12 good faith exception to the exclusionary rule. Should a need
13 arise for future evidentiary hearing on either of those topics,
14 the Court will schedule a hearing in due course, which is what
15 I indicated at docket entry 605.

16 So with that basic background, Mr. Bove, I will hear
17 from you first.

18 MR. BOVE: Thank you, Judge.

19 What I would like to do, if it is acceptable, is
20 address the parts of the motion in this order: First, the
21 defect in Attachment B of the warrant with respect to the
22 things to be seized under the Fourth Amendment. Second, the
23 defect in Attachment A of the warrant with respect to the
24 places to be searched. Then I would turn to the third, the
25 Franks issue, and, finally, address the need for fact-finding.

1 THE COURT: Okay. Let's proceed in that fashion,
2 starting with Attachment B.

3 MR. BOVE: So Attachment B and our challenge to it
4 relates to the part of the Fourth Amendment that requires
5 particularity with respect to the things to be seized. And I
6 think in prior civil litigation relating to the execution of
7 this warrant, Your Honor found and the government conceded that
8 the agents who executed the warrant used Attachment B to seize
9 some personal effects without evidentiary value. That's in the
10 Trump civil decision at 625 F.Supp 1265. That included medical
11 documents, tax documents, accounting information, and
12 passports. And so that is -- that, to me, sort of sets the
13 scene for: Why did that happen?

14 And I think that part of the reason -- we can get to
15 the culpability of the agents -- but part of the reason is that
16 the warrant itself didn't provide sufficient specificity with
17 respect to what could be seized. And that starts in, sort of,
18 the introductory language of Attachment B, which authorized the
19 seizure of, quote, "all evidence of statutory violations that
20 the warrant itself, Attachment B, did not describe, or
21 summarize in any way. The government" --

22 THE COURT: Well, is that correct? It has
23 Subsections A through D with further descriptions.

24 MR. BOVE: That is a non-exhaustive list, from our
25 standpoint, of things that the government suggested to the

1 seizing agents would be examples of the types of evidence. But
2 our argument starts at the top of Attachment B, with respect to
3 this authorization and the use of the word "all," and in
4 particular, the failure to provide the searching agents with
5 any guidance about what these statutory provisions actually
6 prohibit. And that failure to do so in Attachment B is in
7 stark contrast to what happened in the warrant application,
8 where each of those provisions was quoted and described to the
9 magistrate judge who issued the warrant, presumably because the
10 government felt that these were the types of statutes that are
11 not so commonplace that they require that type of description.
12 And it is a failing with constitutional significance of
13 Attachment B to not provide similar guidance with -- to the
14 seizing agents.

15 THE COURT: Well, why is the guidance not already
16 described in A, B, C, and D?

17 MR. BOVE: Because those are not limiting on the -- the
18 word "all." That, as I said, is a non-exhaustive list as
19 indicated by the use of the word "including."

20 But I do want to talk about defects in each of those
21 paragraphs, and I will move on to those --

22 THE COURT: Before you go -- so your -- your contention
23 is, so that, what more needed to be contained in Attachment B,
24 specifically, with respect to the statutory violations?

25 MR. BOVE: There are things that should -- from -- our

1 argument is that there's things that should have been included,
2 and things --

3 THE COURT: Okay. What things should have been
4 included?

5 MR. BOVE: Descriptions of what it means to violate
6 Section 793, 207 --

7 THE COURT: So the elements of those offenses?

8 MR. BOVE: Or, I have seen it with just narrative text
9 summaries that are a little more standard and, sort of, in
10 commonplace, non-legalese language that agents could use, but
11 something that offers some guidance, at least some of the
12 guidance that the government felt was important enough to offer
13 to the judge who issued the warrant.

14 THE COURT: But why is the guidance not enough where it
15 says, "any physical documents with classification markings"?

16 MR. BOVE: Because that's not a restriction on
17 the -- on the top -- the language that I'm talking about.

18 THE COURT: Right. But it has to be read in context,
19 and one would -- one would naturally look to Subsections A
20 through D to determine what it is that the agents were looking
21 for. And it's clearly delineated there to search for physical
22 documents with classification markings.

23 MR. BOVE: Well, Judge, those are examples, but it's
24 not an exhaustive list. And so my point here is that the
25 Fourth Amendment requires particularity, and this top language

1 before the paragraphs doesn't -- the paragraphs that follow
2 don't serve as a restriction.

3 And the context, I think, is important. In addition to
4 these -- these statutes not being described in the warrant as
5 they were in the warrant application, these are particularly
6 complicated statutes. We've had extensive litigation about
7 what 793 means. There are also some interesting restrictions
8 in the case law on what 2071 means. The Rosner case out of
9 S.D.N.Y. in 1972. This is at 35 --

10 THE COURT: Is this cited in your papers?

11 MR. BOVE: I don't believe so, Your Honor.

12 THE COURT: Then let's move on. You can file a notice
13 of supplemental authority later, limited to the word limit.
14 But I don't want to receive, at this point, a string citation
15 of cases that weren't briefed.

16 MR. BOVE: My point, though, without the citation is
17 that 2071 has a specific meaning that is actually more limited
18 than even the text of the statute that is quoted in the
19 application itself. And that is why -- or part of our argument
20 is that in order to be effective and permissible under the
21 Fourth Amendment, the introductory language needed to give the
22 searching agents some guidance about what these statutes
23 actually meant.

24 Now let's talk about --

25 THE COURT: So if you were to have written the

1 description, what would you have included? I'm still a bit
2 unclear as far as what kind of introductory language you think
3 would have been more adequate.

4 MR. BOVE: So for 793, something along the lines of,
5 "unlawful retention of National Defense Information." Or I
6 think, more appropriately -- I don't think it was appropriate
7 to use the term "NDI," and I want to talk about that. So
8 something like "unlawful retention of documents bearing
9 classification markings."

10 THE COURT: But "NDI," that -- why would it be
11 inappropriate to include that term? I mean, it's a critical
12 term in the decisional law for 793.

13 MR. BOVE: Exactly, Judge. In the decisional law,
14 because it is virtually contentless on its face. And the only
15 thing that this warranted was offer some guide -- used the
16 term, a term that the government felt necessary to define and
17 limit in footnote 2 of the warrant application, another example
18 of a place where there was a legal gloss on a term that was --
19 that was relevant to what the agents were going to be doing, a
20 term that the agent -- that the government felt was appropriate
21 to define for the issuing magistrate but not for the searching
22 agents, and that matters in particularity analysis. And so
23 this --

24 THE COURT: Do you have any case law to suggest that
25 for purposes of itemizing property to be seized, there needs to

1 be the equivalent, essentially, of a legal brief going through
2 each essential element of an offense, and other complexities
3 that arise from those elements?

4 MR. BOVE: No, but that's not my argument either. My
5 argument is that it warrants particularity requirement. It
6 obligates the government to provide sufficient guidance to the
7 searching agents about what some of these technical terms mean.
8 It doesn't need -- it's not our position that it needs to be
9 element by element, but some guidance is necessary. And it is
10 telling, I think, it's -- it bears repeating that the
11 government felt that it was important to give that guidance to
12 the issuing magistrate but not to the searching -- the agents
13 who participated in the search.

14 THE COURT: And so, again, the guidance that you think
15 is missing and should have been included -- if you were to just
16 come up with it now, what sort of paragraph would you have
17 looked for?

18 MR. BOVE: I would have provided -- it's not what I
19 would have done, obviously, but what we think is missing from
20 this warrant is at least some type of guidance about what these
21 statutes actually prohibit. Our position on NDI is that it
22 should not have been included in the warrant, in Attachment B,
23 period, because it doesn't provide guidance to the agents who
24 participated in the search, as reflected in the government
25 feeling that it was necessary to define the term and to provide

1 the judicial glosses that Your Honor is familiar with from the
2 vagueness litigation in the body of the warrant itself.

3 So that's a place where, telling the agents they can go
4 make determinations on the fly about what constitutes NDI --
5 our argument is that is -- that is not consistent with this
6 part of the particularity restriction under the Fourth
7 Amendment.

8 THE COURT: Okay. Let's move on then.

9 MR. BOVE: The next phrase that is the focus of our
10 motion is in paragraph C, Government Records. And this
11 is -- this is a place we think that is -- it's overly broad.
12 It's not clear what that means. There is actually two
13 definitions or references to that term in the application, but
14 not in the warrant. At paragraph 21 of the warrant, there is a
15 block quotation of Section 207, 1. Then at paragraph 23, there
16 is a definition of, quote, "records" under Title 44, which I
17 believe is the Federal Records Act.

18 And so this is a place where, one, again, the
19 government providing guidance to the Court, because these terms
20 are ambiguous -- to help the issuing magistrate decide what
21 their -- think about what their arguments were, but didn't
22 provide that guidance to the searching agents. But, two, even
23 the guidance that they provided to the judge --

24 THE COURT: Quick question: Were the agents directed
25 to review the full affidavit prior to executing the search?

1 MR. BOVE: I think that's a fact question that requires
2 a hearing, Judge; it's not something that can be resolved on
3 the face of these papers. That's what --

4 THE COURT: Is that in the operational plan, though,
5 that is an attachment to your motion, that all of the agents
6 were -- were asked to review it?

7 MR. BOVE: I think --

8 THE COURT: I believe there is some reference to that.

9 MR. BOVE: I think there is some reference to that,
10 Judge. But that's a document about what people contemplated
11 beforehand. It's not -- it may be some evidence of what
12 happened in connection with the search. We don't know who
13 reviewed it. We don't know what -- what they made of it. And
14 that's something that is disputed by President Trump and would
15 have to be established at a hearing. In the basic --

16 THE COURT: But "dispute" being whether agents actually
17 followed the instruction to review the full packet?

18 MR. BOVE: Yes. And whether the FBI implemented that
19 instruction in the first place.

20 THE COURT: Okay. All right. Keep going.

21 MR. BOVE: So that's -- that's our issue with
22 government records. And so we've talked about the use of the
23 term "all" in the absence of statutory definitions. We have
24 talked about the problems with using the term "NDI" in a
25 warrant like this, in light of the "void for vagueness"

1 briefing that we submitted, and courts' decades of struggling
2 to define that term. It wasn't something that was permissible
3 to allow the agents to implement as they executed the search.
4 The problems with the term "government records," and especially
5 in light of overlapping and, arguably, to some extent,
6 conflicting definitions in the warrant application itself. If
7 the government wasn't sure what it meant in the application,
8 how could the agents be sure what it meant as they're executing
9 the search?

10 Then there is the reference to presidential records in
11 paragraphs C and D. And for all the reasons that we've cited
12 in our PRA motion to dismiss, there are complexities associated
13 with this term that -- that made it, I think, self-evident,
14 that FBI agents executing a search at a former President's
15 house are in no position under the text of the definition of
16 "presidential records" and the decisional case law around the
17 implementation of that term for agents to decide on the fly by
18 looking at a document whether it is a presidential record.

19 Why do I say that? Because the definition of
20 presidential records, at 44 U.S.C. 2201, excludes extra copies
21 of documents. And so this is -- this was a term that the
22 agents -- they could not apply. It is, just based on the
23 definition of itself, not capable of application in connection
24 with a search.

25 And it's not -- it's not our position that any one of

1 these defects is necessarily a constitutional violation. But
2 collectively, what happened here was that there was,
3 essentially, a warrant issued to search Mar-a-Lago that
4 authorized the agents to search each and every piece of paper
5 that they encountered. And that is made, I think, even more
6 clear in paragraph A, where the attachment -- where
7 Attachment A authorizes the seizure of containers/boxes,
8 including any other contents. And so the combination of all of
9 these issues that I have flagged, in Attachment B, cumulatively
10 resulted in a violation of the particularity requirement.

11 THE COURT: All right. Please continue.

12 MR. BOVE: I think I had some errant references there
13 to Attachment A. I was talking about Attachment B.

14 THE COURT: Yes.

15 MR. BOVE: Attachment A is the part of the warrant that
16 describes the places to be searched. Taking a look at the
17 warrant application, we think that it established probable
18 cause with respect to the six locations that we identified in
19 our brief at page 3. The White & Gold Ballroom; the storage
20 room; the anteroom to the storage room. And then, there are
21 two that relate to, sort of, the President's Residential Suite,
22 and the anteroom to that in Pine Hall; and then, lastly,
23 President Trump's office, referred to as The 45 Office.

24 And so that -- you know, to decide what a Court could
25 have potentially authorized to be searched, we obviously looked

1 to the application and the references in the application to
2 "where could evidence potentially be found in these premises
3 that the government is seeking to penetrate, to conduct a
4 search like this?"

5 And context here matters also. This was an enormous
6 piece of property. We're not talking about the search of a
7 single-family home in the suburbs. We are not talking about
8 the search of an apartment in the city. I think the attachment
9 itself describes Mar-a-Lago as a 17-acre property, with 58
10 bedrooms and 33 bathrooms.

11 THE COURT: But what's your point? I mean, it's a
12 large property.

13 MR. BOVE: That the government has to establish
14 probable cause to search the areas that they identified in
15 Attachment A, and that they did not do so. And instead,
16 they -- that application, at most -- at most, established
17 probable cause with respect to six locations, bulleted out
18 at -- at page 3 of our brief, the ones that I just summarized.

19 And then there are -- again, there is a part of
20 Attachment A, like Attachment B conferred an unamountable --
21 excuse me -- unacceptable amount of discretion on the searching
22 agents, that the area to be searched, the definition of that,
23 includes rooms, quote, "available to be used by both President
24 Trump and," quote, "his staff."

25 There are fact questions relating to this motion about

1 how that language was implemented on the ground that bear on
2 the manner in which this search was executed and whether it was
3 constitutionally reasonable. That's one of the parts of the
4 discretion that we think was unfettered that was conferred by
5 Attachment A.

6 The second is that the warrant excludes rooms, quote,
7 "used by third parties." And there is some information in the
8 operations order about how the FBI planned on the front end to
9 implement that language, but factual disputes about how it
10 actually happened on the ground, and whether or not -- I mean,
11 ultimately, we are talking about Fourth Amendment
12 reasonableness here. And so there is a question about, did the
13 application establish probable cause for the scope of a search
14 defined in Attachment A? We say no. And even if it did, what
15 kind of discretion did it give to the agents where -- in a
16 context where the Fourth Amendment requires that agents not be
17 permitted to go on a rummaging. And a "rummaging" is a word
18 that the Supreme Court uses, not me. And that is the issue
19 here when you look at Attachment A that authorizes a search of
20 the entire property when the application only speaks to
21 specific areas.

22 And what happened during this search? Agents were --
23 searched and photographed the First Lady's bedroom. They
24 searched the bedroom of President Trump's youngest son.
25 They -- they purported to look for classification documents in

1 a gym and in a kitchen, and took photographs of those
2 locations. And just like with respect to Attachment B, when
3 the Court's considering: Did this warrant with sufficient
4 particularity --

5 THE COURT: Were any items recovered from those extra
6 locations that you have just referenced?

7 MR. BOVE: Not to my knowledge.

8 THE COURT: So then what -- what's the prejudice if
9 there was -- if there was searching of locations, and no
10 evidence seized as a result, then what's your legal claim?

11 MR. BOVE: The legal claim is that there was an
12 impermissibly broad search that hit rooms all over Mar-a-Lago
13 that there was not probable cause to search, and that the
14 overbreadth of that search violated President Trump's rights.
15 There are factual questions about the scope of the search and
16 the manner in which it was executed that bear on the
17 suppression remedy. But the fact that the agents went into and
18 photographed and documented rooms where there -- there was not
19 probable cause to be searching, and in -- a child to -- to
20 search, Judge? We think that bears on the conduct of the
21 agents in the search, and it is relevant to this --

22 THE COURT: You would agree that the paperwork, though,
23 is a sort of thing that can be located anywhere?

24 MR. BOVE: Generally speaking, yes. But it had to be,
25 for purposes of this warrant, the types of paperwork that were

1 at issue in this case. And there was no -- no evidence, for
2 example, that somebody had stored documents bearing
3 classification markings in the -- in the room where President
4 Trump's son kept his Peloton bike, or the gym, or the kitchen.
5 And that's the -- that's an important part of our argument,
6 that the agents fanned out and they conducted this search in an
7 unconstitutional way.

8 THE COURT: Okay. Anything further? We talked about
9 Attachment B. Anything further on Attachment A?

10 MR. BOVE: No, Your Honor.

11 THE COURT: Okay.

12 MR. BOVE: Now, on the Franks issue. We have
13 identified a series of what we think are omissions and, to some
14 extent, misrepresentations to the magistrate judge that would
15 have affected the probable cause determination and for which a
16 hearing is necessary to look at the mental state of the agents
17 and the -- at least the agent who signed the affidavit, and the
18 reasons that these things were not included.

19 First, we have some evidence and some public statements
20 by FBI personnel that they did not think that this -- that a
21 search pursuant to a warrant was necessary, and that they felt
22 it was inconsistent with historical practice.

23 Exhibit 1 to our motion identifies a request by the FBI
24 to the government to seek consent to conduct a search. And
25 then we've also identified the June 2023 Congressional

1 testimony of ADIC D'Antuono on this issue. And I think that
2 the Congressional testimony is important because, by his
3 description, there are communications bearing on this issue up
4 to the level of a deputy director at the FBI. He says, quote,
5 "there are emails that I have written back and forth that my
6 view is -- what we -- is that we want consent." And I
7 don't -- the government has not produced those. And these are
8 things -- these -- those positions --

9 THE COURT: But why would that matter legally to the
10 veracity of the affidavit? Whether there was another
11 alternative that would have been more collaborative, why does
12 that entitle you to a Franks hearing?

13 MR. BOVE: Because at paragraph 80 of the search
14 warrant application, the affiants swore that premature
15 disclosure of the facts in the government's intentions could
16 have a significant and negative impact on the continuing
17 investigation and lead to the destruction of evidence. And I
18 think that -- there is at least a factual dispute, based on
19 Exhibit 1, in the Congressional testimony, about whether that
20 was accurate, and it bears on the judge's analysis of the types
21 of risks that are posed by the -- by the picture the government
22 is painting in that application.

23 THE COURT: Could it just be that -- that reasonable
24 minds can disagree, and one agent believes that one alternative
25 is superior, and somebody else thinks another avenue is better?

1 MR. BOVE: That could certainly be the practical
2 reality, Your Honor.

3 THE COURT: So then why would that lead us to conclude
4 that there is a material misrepresentation in the search
5 warrant?

6 MR. BOVE: Because ADIC D'Antuono is the affiant's
7 boss, and if that was his view and a lower-level agent swore
8 out this warrant with that statement, there are factual
9 questions about why it was made, the intent behind it, and why
10 a decision was made to keep this under seal and make false
11 claims about risks of flight and destruction of evidence that
12 FBI leadership, at least at some relatively high level, did not
13 share.

14 THE COURT: What specific paragraph are you pointing to
15 in the affidavit?

16 MR. BOVE: 80.

17 THE COURT: This concerns a request for sealing. Does
18 that really go to the substantive probable cause determination?

19 MR. BOVE: I think it does with respect to 793, Judge.
20 And the government has conceded at this point that the risk of
21 potential harm is an element to be considering. They made
22 representations in this affidavit about whether or not it was
23 safe to be storing the types of documents that they allege
24 existed at Mar-a-Lago under those circumstances. And so a
25 representation about risks to destruction of evidence and

1 flight, it is relevant to what the judge is considering.

2 I take your point about --

3 THE COURT: Is there any other statement in this
4 affidavit that you think meets the level of a material
5 misrepresentation in the way that paragraph 80, you say, does?

6 MR. BOVE: No. I think the rest of our points are
7 omissions points.

8 THE COURT: Okay. So 80 is the only
9 allegedly -- alleged misrepresentation that you include in your
10 submission?

11 MR. BOVE: Yes, Your Honor.

12 THE COURT: Okay. All right. Then let's turn to the
13 omissions -- or the purported omissions.

14 MR. BOVE: The omissions that we've identified, the
15 first two relate to the fact that while the President was the
16 President of the United States, it is undisputed that he was
17 not required to maintain the security clearance. And I think
18 it's also -- it was known to the FBI and undisputed here that
19 there were very sensitive briefings provided to the President
20 at Mar-a-Lago while he was in office. And those things bear on
21 the circumstantial evidence of intent that the government laid
22 out in this application, and we think, undercut it to such an
23 extent that at least a hearing is necessary.

24 THE COURT: But why? So you would have added in, let's
25 say: During the presidency he received classification

1 briefings. How would that have changed anything?

2 MR. BOVE: Because the government's theory of this
3 search is that the -- the storage of these alleged documents
4 was intentional and willful under 793, and that it created
5 risks of harm to the national --

6 THE COURT: Right. Post-presidency.

7 MR. BOVE: Yes, Your --

8 THE COURT: So I'm not -- I'm failing to see why adding
9 into this affidavit, the fairly undisputed and obvious point
10 that an executive would be receiving classified briefings
11 during a presidency would have made any difference in the PC
12 inquiry.

13 MR. BOVE: The fact that the President wasn't required
14 to obtain a security clearance while he was in office was --
15 was new to me when I started this case. I'm not sure it would
16 have been obvious to the issuing magistrate. And our point
17 is --

18 THE COURT: But the key is post-presidency.

19 MR. BOVE: I agree. But it bears on his intent. And
20 the part of what the government has to establish to show
21 probable cause to justify their search is that the President
22 had a state of mind that supports the statutory allegations in
23 the warrant. And so our position with respect to these
24 omissions is that both these things bear on the evidence of his
25 intent and should have been included.

1 THE COURT: Okay. What's your next omission argument?

2 MR. BOVE: The next one -- the next omission argument
3 relates to the description of the way -- I think what the
4 government describes in the application as the referral from
5 NARA. And we think that the dispute that's queued up in the
6 motions to compel about how and when this investigation
7 started, and the way that NARA was implementing the
8 Presidential Records Act was relevant to the search warrant
9 application because part of what the government relies on
10 extensively is the collection of the 15 boxes. And if that was
11 done in an unlawful way, or if it was described in a way that
12 omitted material facts about the government's intent or the
13 level of coordination between the people involved, then that is
14 something that bears on the legality of the collection of those
15 15 boxes, and -- either could have undercut the evidence
16 relating to -- that they described relating to those boxes and
17 potentially undercut the entire probable cause.

18 And this is one of the places where, you know, the
19 motions to compel have sort of caught up to the pretrial
20 motions, and it's one of the reasons that we think we're
21 entitled to additional evidence about the genesis of the
22 investigation.

23 THE COURT: So, hypothetically, the sentence or
24 paragraph that you think should have been added would be what
25 exactly?

1 MR. BOVE: Well, these are facts that are undisclosed
2 to us at this point, but at the very least, we have identified
3 evidence in the motions to compel of coordination with the
4 Department of Justice dating back to September of 2021.

5 THE COURT: Okay. So let's say that had been written
6 into this -- this affidavit, "there was coordination starting
7 in September," why would that have changed anything for
8 purposes of the magistrate's determination of probable cause?

9 MR. BOVE: Because it's part of our argument that
10 the -- that NARA and DOJ lacked authority to demand documents
11 from President Trump that led to the collection of those
12 15 boxes, and the 15 boxes are core to the theory of probable
13 cause in the application.

14 THE COURT: Okay. Those might be valid defenses. Who
15 knows? But the bottom line is, why would they have undercut
16 the probable cause at the point this affidavit was reviewed?

17 MR. BOVE: Because if the 15 boxes were collected in an
18 unlawful manner, then that evidence should not have been relied
19 on by the magistrate as a basis for probable cause to conduct
20 the search at Mar-a-Lago.

21 THE COURT: Okay. All right. Next argument, please.

22 MR. BOVE: The next argument relates to the inclusion
23 of the statutory citations, the Presidential Records Act that I
24 have talked about, but not the decisional case law around the
25 President's discretion to identify and -- excuse

1 me -- designate presidential versus personal records.
2 Acknowledging that there is overlap here between the motion
3 that we have filed in this warrant, this is the type of thing
4 where it is being suggested to the magistrate judge that the
5 agents can -- that, first of all, that the President did not
6 have the discretion to make these designations, which we think,
7 as a matter of law and practice, is false. But it's
8 also -- this omission also leads to the suggestion in the
9 warrant that the agents can go onto these premises and conduct
10 this incredibly broad search and take any piece of paper that
11 they feel meets the definition, including by not applying the
12 copies exclusion in the definition of "presidential records."

13 And so we think that the omission, especially given the
14 inclusion of other decisional case law, for example, about the
15 NDI element, the omission of the decisional case law about the
16 Presidential Records Act.

17 THE COURT: So which case would you have liked to see
18 cited in the affidavit?

19 MR. BOVE: We think Judicial Watch -- we think that
20 they were obligated to --

21 THE COURT: And if that case had been cited, why do you
22 think it would have made a difference, ultimately, in the
23 issuance of the affidavit?

24 MR. BOVE: We think, because, as a matter of law, the
25 President had -- was able to designate records as personal.

1 And so when you are -- the judge, understanding that, would not
2 have authorized agents to go into Mar-a-Lago and seek purported
3 presidential records.

4 But in addition to that, even if --

5 THE COURT: Even if they bore classification markings?
6 Even accepting your proposition that they're designated
7 personal, they still, ultimately, would have had the
8 classification markings; right?

9 MR. BOVE: I think that could be a different argument.
10 And I -- you will note that we haven't challenged the part of
11 the warrant that authorizes the seizure of documents with
12 classification markings. I'm sure you're also aware that the
13 agents seized every piece of paper anywhere near documents
14 bearing classification markings. And so that is part of our
15 argument about why this search was executed in an
16 unconstitutional way. And so, I think on this --

17 THE COURT: But are any of those other materials sought
18 to be introduced at trial?

19 MR. BOVE: This -- that issue, Judge, is -- is one that
20 is bound up in what we think is the necessary suppression
21 hearing. It's also going to be an issue in the CIPA
22 litigation, and so that -- that is going to be a theme in a
23 number of motions that are going to come up.

24 THE COURT: Okay. Any other omission arguments you
25 would like to make?

1 MR. BOVE: No. Those are the omissions arguments. And
2 we understand that any kind of Franks motion entails a
3 materiality analysis. The questions that you have been putting
4 to me about, essentially -- wouldn't this warrant have still
5 established probable cause even if you cut -- excuse me -- even
6 if you added in the omissions and corrected the
7 misrepresentation, in paragraph 80?

8 And here, we have identified a couple of arguments that
9 we think undercut the probable cause showing, generally, and at
10 least require fact-finding with respect to this issue in -- on
11 the materiality point.

12 The first is that there is a staleness argument here.
13 This warrant focused on what we talked about earlier as the
14 choreography of the boxes in May and June of '22. It's months
15 later. There is not much evidence about where, specifically,
16 these things were in that warrant in July, moving into August.
17 And that is -- that comes to play in paragraph 75 and 76 of the
18 warrant application, where witnesses are -- are -- I think
19 these were exculpatory disclosures in the application, saying,
20 "I did not see boxes in President Trump's residential suite."

21 So I understand that the government feels very strongly
22 about their showing of probable cause in this application, and
23 they will have a lot to say about that. Our point is, there
24 are some things here that undercut that, and then there are
25 some very serious omissions. And the question is, is

1 this -- does this warrant fact-finding about the intent behind
2 those admissions?

3 We have identified some things here between
4 ADIC D'Antuono's testimony, whatever was going on at NARA and
5 the coordination with the DOJ that bear on the conduct of the
6 investigation, things that bear on the legality of the
7 collection of the 15 boxes that were so central, I think, to
8 this warrant application.

9 And so, looking at it collectively, we think these
10 omissions and the one misrepresentation do warrant a Franks
11 hearing.

12 THE COURT: Okay. Thank you. If you're finished with
13 your presentation, then I will hear from counsel for the
14 Special Counsel.

15 MR. BOVE: I have -- I have a couple points about the
16 hearing framing itself, about -- about some of the case law
17 around that.

18 THE COURT: Okay. I will hear that.

19 MR. BOVE: So one question is, how to apply the good
20 faith exception in this setting. And obviously, there are
21 plenty of decisions where courts look -- look beyond or assume,
22 sort of, the issues that I've just described about
23 particularity or Franks -- Franks problems, and say: In any
24 event, the agents acted in good faith, so there's no Fourth
25 Amendment violation here.

1 We understand that that is a potential route of
2 analysis. We don't think that that can happen under Leon
3 without fact-finding. And so what type of fact-finding?

4 Our position is that this is one of those warrants that
5 it is so facially deficient that it could not have been relied
6 on because of the use of the word "all," the authorization to
7 search any -- excuse me -- to seize any piece of paper in any
8 of these boxes, the fact that that's actually what happened.
9 And I think, importantly here, Judge, our -- the pending
10 spoliation motion, which is not fully briefed yet, very much
11 overlaps with the fact-finding that is necessary about search
12 execution.

13 And so I -- I don't -- I'm not prepared to talk about
14 that. The opposition was filed late last night. But I think
15 it is relevant as Your Honor considers what's going to happen
16 here for fact-finding about whether this search was conducted
17 in a legal way and in a way that accounted appropriately for
18 President Trump's rights.

19 And so footnote 23 of Leon itself says that all of the
20 circumstances may be considered in connection with the
21 application of the good faith exception. The Supreme Court's
22 Herring decision talks about looking to -- those circumstances
23 frequently include a particular officer's knowledge and
24 experience.

25 Knowledge and experience of the searching agents is

1 very relevant here to the extent that we are thinking about
2 searching -- the agents being asked to apply terms like "NDI,"
3 and even the context -- the concept of, what are the
4 classification markings that could warrant seizure? In this
5 specific setting, knowledge and experience is relevant and
6 disputed.

7 THE COURT: So is your position that any investigation
8 searching for classified information in investigating under
9 793(e), they're just -- the terms are too ill-defined, and
10 absent an exhaustive legal brief, who would be capable of even
11 conducting such a search?

12 MR. BOVE: I wish. It would make my job a lot easier.
13 But that's not our argument.

14 Our argument is that one way or another, the government
15 obviously has an obligation to conduct a reasonable search.
16 That can be implemented through the training of the agents who
17 go out and do it. It can be implemented because the agents are
18 articulately experienced in the national security space. It
19 can be implemented because there are instructions given to the
20 agents before they would do that. It can be implemented on the
21 face of the warrant itself.

22 THE COURT: It just seems like you're making policy
23 arguments about training and experience, and it seems far
24 afield from the legal inquiry whether the affidavit itself
25 contained the essential elements to meet the probable cause

1 standard. I'm unclear as far as what -- what you -- what you
2 think should have been included in the affidavit or what was in
3 there that shouldn't have been in there from a good faith
4 perspective.

5 MR. BOVE: From a good faith perspective, more guidance
6 was required so that when -- if you look at the face of that
7 attachment and you start with the word "all," and then you go
8 to subparagraph A that talks about seizing any box, any
9 container, any piece of paper adjacent to a piece of evidence,
10 then that on its -- that is a -- that is a warrant that
11 authorizes way too much. And nobody with, I don't think,
12 pretty basic Fourth Amendment training could understand, from
13 those two pieces of this, that this is something that -- that I
14 can go in and execute in a way it was executed.

15 With -- so that's our -- you know, we have this -- what
16 I think of as more of a merits-particularity argument. But on
17 good faith, Herring itself says, look to the officer's, quote,
18 "knowledge and experience." Martin from the Eleventh Circuit
19 talks about looking at facts outside the affidavit.

20 And so, for the government to establish that this is a
21 warrant that was executed in good faith, there are disputes
22 about that. How -- what were the instructions that were
23 provided to them? What happened from the staging area before
24 the search was executed? What happened while they were
25 conducting the search? There were attorneys on the set. What

1 questions were put to them? How was that treated?

2 There are all kinds of things that bear on the manner
3 in which this search was executed that have to be resolved,
4 that are disputed, that we don't know about right now, before
5 the Court could find that the exclusionary rule doesn't apply
6 under Leon.

7 THE COURT: Okay. All right. Anything further?

8 MR. BOVE: The last point -- and I will be quick.
9 There is a legal dispute in our papers about whether the good
10 faith inquiry includes analysis of the officer, the searching
11 officers' subjective intent. And so, I understand -- from my
12 perspective, there is, sort of, conflicting language or
13 language that's in tension between Leon and some of the other
14 cases that talk about looking to the deterrence value of
15 applying the exclusionary rule. And in those cases, when
16 you're assessing the deterrent value, you have to look at
17 whether the conduct that's challenged was negligent or reckless
18 or some other type of mental state that led these things to
19 happen.

20 And so Herring itself talks about differences between
21 isolated negligence, systemic error, and reckless disregard of
22 constitution requirements. Davis is another Supreme Court case
23 that talks about the degree of, quote, "police culpability."

24 And so those are standards that require some kind of
25 inquiry, even if it's not an inquiry about just, you know --

1 what was the specific motivation of the searching agent? Some
2 kind of inquiry into what was going on in the heads of the
3 agents who conducted these searches, as informed by the
4 circumstances under which they conducted them.

5 THE COURT: But what sort of evidence do you have that
6 would rise to the level of that -- of that harsh sanction of
7 exclusion? Referencing the Davis case, for example, you would
8 need clear reckless behavior and things of that nature. What
9 in the record, as far as you're aware, would even rise to that
10 level?

11 MR. BOVE: Well, I think it's -- first of all, I think
12 it's the government's burden to establish good faith and not
13 our burden to disprove it. But even with respect to what
14 evidence is there in the record, our position is that the
15 things -- the factual disputes that you're starting to see
16 percolate in the spoliation motion are very much a part of a
17 showing of recklessness, at minimum, with respect to the
18 execution of this search.

19 The failure to keep these boxes intact, I think,
20 was -- was -- we will just leave it at "a significant failure"
21 from our perspective that does bear on the application of good
22 faith exception.

23 But, in any event, the government can't ask you to look
24 past the particularity issues that we talked about, and not
25 have a hearing and, say, apply Leon without establishing this

1 themselves. And so it's their showing to make. And we think,
2 especially once this spoliation motion is fully briefed, that's
3 a threshold we've crossed and will require fact-finding.

4 THE COURT: Thank you. Okay. Mr. Harbach.

5 MR. HARBACH: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. HARBACH: If it's all right with Your Honor, I
8 would like to begin with the Franks discussion.

9 THE COURT: Okay.

10 MR. HARBACH: But I would also like to make the point,
11 to just put a marker down for Your Honor that I will come back
12 to a little bit later, that in the last several minutes of
13 Mr. Bove's argument there was some real conflation of the
14 necessity -- they're arguing their alleged necessity of a
15 hearing in connection with the Leon good faith requirement and
16 the necessity of the hearing under the Franks rubric. Those
17 are -- those are in separate silos.

18 So for the moment, I just would like to focus on the
19 Franks hearing. And, just for the record, I would like to
20 reiterate the standard that the defendant was -- must -- must
21 satisfy -- and I'm confident Your Honor knows this, but just
22 for the record -- from Franks, it's required that the defendant
23 make a substantial preliminary showing that the affiant made
24 false statements; furthermore, that the affiant did so either
25 intentionally or with reckless disregard for the truth. So

1 it's not a question of good faith. That is the showing that
2 the defendant must make.

3 And, furthermore, the Kapordelis case makes explicit,
4 which was something that was implicit otherwise, namely, that
5 the defendant bears the burden of showing that, absent the
6 omissions or misrepresentations, probable cause would have been
7 lacking.

8 I will also direct the Court to the Graham case which
9 we have cited in our papers. And it states -- makes a point of
10 stating that a Franks hearing is warranted in cases of
11 omissions in -- quoting now -- "rare instances," closed quote.

12 So the last thing I would like to say is just to
13 reiterate what the Court said in Franks itself. This is at
14 page 26-84 of the Supreme Court Reporter version of the
15 opinion.

16 It says: "To mandate an evidentiary hearing, the
17 challenger's attack must be more than conclusory, and must be
18 supported by more than a mere desire to cross-examine." There
19 must be allegations of deliberate falsehood or of reckless
20 disregard for the truth, and those allegations must be
21 accompanied by an offer of proof.

22 So a couple of times this morning, you heard Mr. Bove
23 suggest that they've made a substantial threshold showing about
24 false statements, and that, therefore, a hearing is required to
25 explore things like recklessness, and the state of mind of the

1 affiant.

2 And our position is that that's just wrong; that the
3 defendant is required to make a substantial showing on both
4 counts that is more than speculative, more than conclusory, and
5 requires an offer of proof, which, we submit, their papers
6 woefully fail to do.

7 So turning to the four items in the brief. And just a
8 bit of table-setting here. Your Honor asked Mr. Bove whether
9 the first item in their papers -- in their original motion was
10 the only affirmative misrepresentation in the warrant that they
11 were alleging. What confused me about that is that the papers
12 don't -- the papers themselves, the defendant's motion, don't
13 characterize that as a misrepresentation; they characterize it
14 as an omission. In other words, missed as -- the affiant's
15 omitting to include this allegation about what was
16 happening -- what other people in the FBI may have thought
17 about the search.

18 So I don't know whether Your Honor needs to clarify
19 with them or not, but their -- their papers are quite clear
20 that the allegation concerning paragraph 80 is an omission, not
21 an affirmative misrepresentation.

22 Your Honor has already made a point that I was going to
23 make, which is that the presence of -- that their argument for
24 why it matters is paragraph 80 that appears in the request for
25 sealing section, which, in our view, utterly undercuts the

1 notion that this had anything to do with probable cause;

2 Your Honor has already recognized that.

3 And I will further say that if you look at the actual
4 language of the affidavit in paragraph 80, the
5 sentence -- Your Honor read it a little while ago to
6 yourself -- that the sentence that precedes the sentence that
7 they're talking about, about the necessity of secrecy, makes it
8 clear what the actual reason for the request for sealing was,
9 and that it had nothing to do -- the point being, there
10 was no -- there wasn't even any conflict, factual or otherwise,
11 between these allegations about what other people on the Bureau
12 thought, and what was put in the affidavit. And --

13 THE COURT: Do you agree that the "other people" we're
14 talking about is the superior of the -- of the affiant?

15 MR. HARBACH: The person who's -- who is specifically
16 mentioned by name in the defendant's briefing was a superior;
17 that's true. That's true.

18 THE COURT: So --

19 MR. HARBACH: Quite -- quite far up the chain.

20 THE COURT: Hold on. Is it correct that the affiant's
21 superior took the position that a consent search was preferable
22 to what ultimately took place on August 8th?

23 MR. HARBACH: I -- I personally don't know the answer
24 to that, nor do I think it is remotely necessary to resolve
25 that question for all the reasons I have just said.

1 Any alleged tension between that -- that fact, even if
2 true, and what the affiant put in the affidavit -- there is
3 none. There is no tension between those two things. So there
4 is -- there is no falsity in having omitted that fact. And
5 even if there were --

6 THE COURT: So if it had said, for example: My
7 superior thinks we can go through a consent route, but I
8 disagree for these reasons, would that have made a difference,
9 you think, in the issuance of the warrant or in the probable
10 cause determination?

11 MR. HARBACH: Definitely not.

12 THE COURT: Okay. Why?

13 MR. HARBACH: Because, among other things, remember the
14 context of where this appears in the affidavit. Again, the
15 only place in the affidavit that they say this even hits the
16 ground is a request for sealing. It wasn't even part of the
17 probable cause that the magistrate judge had to consider.

18 And -- and as I have said already, there is
19 nothing -- there is no -- there is no falsity about it. There
20 is nothing about it that remotely even touches on whether there
21 was probable cause in this case. And I will -- I will further
22 say that there is nothing in the papers. There is nothing in
23 their papers suggesting or arguing about what -- what would
24 happen had this been disclosed, other than a generic reference
25 to staleness, which I will get to in a moment. But my point is

1 they don't even try to make that showing.

2 So I would like to move on to the second item, which is
3 this notion that I don't think I spent -- need to spend too
4 much time on, the alleged failure to disclose that presidents
5 are not required to obtain clearances, and that Mr. Trump had
6 received classified briefings at Mar-a-Lago while he was
7 President.

8 Now, one -- one important point I would like to make
9 about this, is that this is the first of two rationales they've
10 offered that involve alleged omissions about a defense theory,
11 essentially. There is this one, and then there is the one that
12 relates to the PRA. And really important point to note up
13 front, is that there is a letter from Mr. Trump's then counsel
14 that he requested be included in any application to a judicial
15 officer, and so the affiant included it.

16 In that letter, there are various theories articulated,
17 including emphasizing, among other things, the President's
18 authority to declassify. And as Your Honor knows from the
19 exhibits, that letter is part of the packet; it remains part of
20 the packet to this day.

21 Two points about why that matters. Number one, it
22 means that -- that Mr. Trump had an extraordinary opportunity,
23 quite rare, unprecedented in my personal experience, to say
24 whatever he wanted to about what was important to the defense
25 in the context of the investigation at that stage. And that

1 was included in the search warrant application that was
2 presented to the magistrate. Now, why does that matter? Most
3 principally, because that fact alone is totally inconsistent,
4 totally inconsistent with any alleged intent on the part of the
5 affiant to mislead the Court about what Mr. Trump's defense
6 theories were or what Mr. Trump was worried about or what
7 Mr. Trump's position was on anything.

8 And, by the way, it's not just attached; the search
9 warrant actually references it in paragraph 52. So it's overt,
10 the text of the warrant mentions it, it's included. There is
11 no way that they could make their required showing about
12 intentional intent to deceive or reckless disregard in light of
13 that fact.

14 Second, as we discussed in our brief, and as you
15 pointed out, so I will stay here briefly, whatever
16 authorization he had while he was President -- it doesn't
17 matter when it's post-presidency. Your Honor has already made
18 that point. So I won't dwell there. But that is among the
19 reasons why. It's another way of saying this would not affect
20 probable cause at all.

21 A related point, before I forget, is that to the extent
22 Your Honor is assessing the showing, the lack of showing that
23 they have made about what the affiant's intention -- intent
24 was, the second reason the letter bears on that, apart from
25 just the fact that -- its inclusion in the packet, is that

1 neither of these defenses that the defendant now claims were
2 allegedly omitted was made in that letter. The point being, if
3 we're talking about an intentional misrepresentation or
4 reckless disregard, there is every reason to believe that the
5 affiant had no reason to suspect that those things were
6 remotely relevant to what he was preparing the affidavit about.

7 So moving on to the third one. The alleged
8 misrepresentation about the initiation date of the
9 investigation. This won't take me long. I'm not going to
10 digress into the briefing we've done elsewhere and the argument
11 we've had elsewhere about why that argument is totally wrong.

12 Regardless, it plainly does not affect probable cause
13 here, and they make no allegation that it does. So it's false.
14 Even if it were true, it would not remotely affect probable
15 cause. And that's all I'm going to say about that.

16 THE COURT: Can you just develop that a bit more. I
17 mean, the argument is that if it had been revealed in the
18 affidavit that the investigation really started in September,
19 that it would have called into -- called into question the
20 legality of the initial request for the documents.

21 And I'm summarizing. But can you explain your view as
22 to why even accepting the date of the commencement of the
23 investigation, it wouldn't alter the probable cause calculus?

24 MR. HARBACH: Well, sure. But I would also like to
25 point out that -- what did the affiant swear to? The affiant

1 swore to the date that NARA referred the matter to the
2 Department of Justice.

3 The argument that the defense has developed
4 post-indictment in the context of all sorts of motions,
5 this -- this conspiratorial theory that there was something
6 brewing behind the scenes at the Department is nothing that one
7 could have expected the agent to even be aware of at the time.

8 And so, the premise of your question assumes a
9 mischaracterization of what actually happened. And, as I said,
10 it's false.

11 THE COURT: Well --

12 MR. HARBACH: It didn't happen that way --

13 THE COURT: -- please try not to put words in my mouth.
14 All I'm saying is if we accept the contention of the defense
15 that the investigation happened well before the formal
16 referral, then why, still, would it or would it not make a
17 difference for the probable cause inquiry? That's really the
18 nub of my question.

19 MR. HARBACH: I understand. And I -- I didn't mean to
20 try and put words in your mouth, Your Honor. All I meant was
21 your question made the assumption that you're just making
22 now --

23 THE COURT: Okay. So assuming that, would it make a
24 difference to probable cause?

25 MR. HARBACH: It would not, and the reason it would not

1 is because it doesn't remotely bear on any of the elements.
2 Had -- I hesitate to hypothesize about it because I'm not even
3 sure I can articulate the full scope of their theory. But if
4 it is as simple as, the FBI was doing some investigation
5 related to this case before the NARA referral letter came over,
6 then I think, obviously, that would have nothing to do with
7 probable cause. There is not much more I can say about that.

8 THE COURT: Okay. Then let's turn to any additional
9 arguments you wish to make on the purported omissions.

10 MR. HARBACH: The last one is the -- the omission of
11 the definition of personal records in the affidavit. A couple
12 of points I would like to make here is, A, it's nowhere in
13 their letter which the affiant attached to -- sorry, I didn't
14 mean to say "their." It's nowhere in Mr. Trump's counsel's
15 letter which we attached -- which the affiant attached to the
16 affidavit. And that proves the potentially more salient point
17 that Trump himself did not come up with this defense until
18 almost a year and a half later. There is no way that the
19 affiant could have known, much less should have known at the
20 time he swore out the warrant, that this idea of the
21 Presidential Records Act operating in a way to authorize the
22 President to retain classification information, that is --
23 that's way outside any reasonable bounds for what we would
24 expect an affiant to know at that time. More substantively, as
25 we have briefed and argued elsewhere, the PRA --

1 THE COURT: Just curious, why are there references in
2 the affidavit to the Presidential Records Act at all?

3 MR. HARBACH: It probably -- well, the answer is: In
4 order to explain the background of why the National Archives
5 was interested in the return of boxes in the first place.
6 That's why.

7 THE COURT: Okay. Please continue.

8 MR. HARBACH: Okay. Thank you.

9 And my colleague also reminds me that another reason
10 it's in there is that among the statutes that was
11 charged -- correction -- that was offered as justification for
12 the search warrant is, 18 U.S.C. 2071, which is the retention
13 of government records. So that's also -- it was also relevant
14 for that. That, of course, was not charged in the indictment,
15 but that answers your question, I think, in part about why it
16 was included.

17 So I have already said a lot about their lack of
18 showing any mental state. Their showing is pretty much
19 nonexistent. So I'm not going to dwell there, except to
20 reiterate that this is their burden. They don't get to wave
21 their hands and say, well, there is some things that should
22 have been in the -- in the affidavit, and so we need to get the
23 agent in here for a hearing so that we can explore what his
24 mental state was. Wrong.

25 THE COURT: Okay. I think I have heard sufficient

1 argument on the Franks hearing. Let's get to particularity,
2 please.

3 MR. HARBACH: I'm happy to. May I make one brief point
4 about staleness?

5 THE COURT: Okay.

6 MR. HARBACH: It's only something that -- that occurred
7 to me today as I was listening to Mr. Bove, because what I
8 heard -- for the first time, what I heard them say is that they
9 conceded that there was probable cause for the six areas that
10 were named in -- in the warrant affidavit. If that -- in light
11 of that concession, it cannot be their claim that had the
12 things that were omitted been included, there would have been a
13 staleness problem. If they're going to concede that there is
14 PC, even for just those six places, then it has to mean that
15 there is no staleness problem. So our -- our position now is
16 that that concession ends that discussion.

17 THE COURT: Okay. Well, we will clarify with Mr. Bove
18 if that's the scope of his statement on that issue. Okay.

19 MR. HARBACH: And the last thing I will say on
20 staleness is that, to the extent it is even part of the
21 discussion, which it shouldn't be, paragraph 78 of the search
22 warrant specifically says: Additionally, no witness has
23 indicated that boxes have left the premises since the provision
24 of the 15 boxes to NARA on January 17, 2022.

25 Our view is that that is plainly sufficient to

1 substantiate probable cause to believe that the boxes remained
2 on the property. And that -- that's another reason
3 there's -- that's what I was going to argue first, before what
4 Mr. Bove said today. So no staleness problem.

5 Turning to the validity of the warrant. I will
6 start -- I will take them in A, B order, if that's okay with
7 Your Honor, starting with the place to be searched.

8 Now, with respect to A and B, there -- there is an
9 effort in the papers, and there was also an effort here today
10 to suggest that the manner of execution of the search somehow
11 bears on these two questions. It does not for lots of reasons
12 I'm going to get into, but that's a point I want to make up
13 front.

14 Under the particularity heading, as so far as the
15 description of the property is concerned, he makes some
16 arguments about the -- the six places. He argues that -- and
17 conceded this morning that there was PC to search the six
18 places that the affiant named in the warrant. But he also
19 suggested wrongly that that should somehow limit the areas that
20 the agents were authorized to search. It plainly doesn't.

21 In the first place, I think all of us in here have
22 encountered search warrants of a home or an apartment or even
23 a -- a business, where documents are only alleged to have
24 appeared in one room, and the warrant authorizes searching of
25 the entire property. That's particularly appropriate here,

1 where, as Your Honor observed, A, it's a big property; B, the
2 items that the agents were looking for are papers, documents,
3 essentially, and are quite small. And -- and, furthermore, the
4 agents, to the extent that the manner of execution of the
5 search is even relevant -- and it's not -- the agents didn't go
6 everywhere on the property.

7 Mr. Bove did acknowledge that the warrant on its face
8 did not allow agents to go into, for example, guest rooms where
9 there were other people staying at the club, or other places
10 that -- that Mr. Trump didn't have access to.

11 But Mr. Trump did have access to his wife's quarters,
12 to his son's quarters, and so there was nothing remotely
13 inappropriate about agents searching those places. They were
14 plainly within the scope of the warrant. And as Your Honor
15 pointed out --

16 THE COURT: Was there any evidence to suggest that
17 documents with classified markings would have been located in
18 the former president's -- the bedroom of his child?

19 MR. HARBACH: Well, there -- there was probable cause
20 to search because of the -- the two reasons I said. A, that
21 the magistrate was amply within -- within his rights to
22 conclude that documents of the type that are covered by the
23 warrant could be located anywhere in the premises; and 2, the
24 warrant's limitation -- other limitation was about where
25 President Trump had access. So President Trump plainly had

1 access to those two places.

2 The last thing I will add that I think gets to your
3 question, is there was some evidence that these boxes moved.
4 And so, to suggest that the --

5 THE COURT: But was there any evidence to suggest that
6 the boxes moved to the child's room?

7 MR. HARBACH: No. No direct evidence of that, but --

8 THE COURT: Any indirect evidence?

9 MR. HARBACH: But -- only insofar as the boxes moved.
10 Can we say definitively every place the boxes moved? I mean,
11 at one point the boxes were in a -- were in a shower in a
12 bathroom.

13 I mean, but -- but here is the point. Your Honor has
14 already hit on this. There was no rummaging anywhere, least of
15 all, in either of those two places. The agents did
16 a -- a -- they carried out their duties professionally,
17 expeditiously. And as Your Honor has already pointed out,
18 nothing was seized from either of those locations. But it
19 would have been irresponsible for them not to search there,
20 especially when they -- they were plainly within the scope of
21 the warrant.

22 THE COURT: In terms of where information with
23 classification markings was ultimately found, can you clarify?
24 I know there is -- there is a 302 that -- that lists out some
25 of that information. But I just wanted to clarify. Other

1 than -- other than the storage room?

2 MR. HARBACH: And the -- and the President's office,
3 Former President's office.

4 THE COURT: Those two locations?

5 MR. HARBACH: That is correct.

6 Can I have a moment, please, to make sure I get this
7 right?

8 THE COURT: Yes.

9 MR. HARBACH: To answer the question that I think
10 Your Honor is getting at: The storage room and the office
11 area; those are the two places.

12 But -- but what I want to bring the Court back to is
13 something that you've already hit on, which is -- the question
14 is whether the place to be searched is adequately described.

15 There is no question that it is. And -- and that
16 should end the analysis for Part A.

17 Part B, whether the items to be seized are described
18 with sufficient particularity in Attachment B. Now, this
19 proves the point that I just made a moment ago. Mr. Bove's
20 argument began with the allegation that the manner of execution
21 of the search bears on this inquiry, and that's why we need to
22 have an evidentiary hearing. So, again, I will just put a pin
23 in that for the moment, and I will come back to it, but that's
24 the framework that they're trying to suggest to the Court.

25 THE COURT: Before you get there, in terms of the

1 affidavit, where -- can you point me to any paragraph that
2 would have supplied probable cause to believe that information
3 with classified markings would have been contained anywhere
4 other than the storage room and the office?

5 MR. HARBACH: If -- if Your Honor's question is, was
6 there a particularized discussion about probable cause existing
7 in other places within Mar-a-Lago --

8 THE COURT: That's what I'm -- yes. I'm hoping you can
9 provide some actual paragraph numbers.

10 MR. HARBACH: Well, there isn't. There isn't a
11 specific articulation of other places at Mar-a-Lago where there
12 might be documents, if I'm understanding Your Honor's question
13 correctly.

14 What there -- what there is evidence of, is that there
15 are -- there is reason to believe that at Mar-a-Lago there are
16 documents. And there is also reason to believe that boxes of
17 documents have moved at the President's direction -- again,
18 just based on the allegations in the warrant -- and those two
19 things together amply justified probable cause to search the
20 entire property.

21 THE COURT: Regardless of whether there is any evidence
22 to suggest that the items are in locations within the
23 property --

24 MR. HARBACH: Un --

25 THE COURT: -- is your submission?

1 MR. HARBACH: I'm sorry, Your Honor.

2 Under the principles that I just stated, yes. And I
3 will also mention that -- well, no, I'm going to stop there.
4 Yes is the answer.

5 THE COURT: Okay. All right. Then I think you wanted
6 to mention Attachment B?

7 MR. HARBACH: Yes.

8 So I would like to start with just the -- the list of
9 items and whether it's adequate.

10 Mr. Bove's first argument spent some time talking
11 about -- these are -- these are arcane statutes that an agent
12 would have no idea what they mean, and, therefore, just listing
13 the statutes isn't enough. Your Honor asked a question about
14 whether he had any case saying that that was improper. We
15 actually have an Eleventh Circuit case on the other side. And
16 my colleagues and I have joked about whether I'm going to
17 pronounce this the right way, but I'm going to say "Wuagneux."
18 And the record won't reflect that, but it's W-U-A-G-N-E-U-X.

19 THE COURT: Is this in your opposition?

20 MR. HARBACH: Oh, yes.

21 THE COURT: Okay. Thank you.

22 MR. HARBACH: And in this case, I will direct the Court
23 to -- the citation is 683 F.2d 1343; the pincite is 1350. Now,
24 in this opinion, the Court was entertaining a particularity
25 challenge to a search warrant. And they make a point that is

1 salient here by way of example.

2 At the beginning of headnote 6 -- well, take that back.

3 In footnote 5, which is also at page 1350, it lays out
4 the list of things that that warrant authorized to be seized.

5 The -- the last two categories, which, in the opinion
6 are labeled 10 and 11, Number 10 is: Records of any financial
7 transactions between labor union trust funds and Sage
8 Corporation or its subsidiaries which are evidence of
9 violations of 26 U.S.C. 7201, 7203, and 7206(1), 18 U.S.C. 664,
10 18 U.S.C. 1954, 1962, and 29 U.S.C. 501.

11 And then Item 11 is: Property that constitutes
12 evidence of the above-enumerated offenses, fruits of the crimes
13 named above, and property which is or has been used to commit
14 the crimes enumerated herein.

15 The Court states at the top of headnote 6: At the
16 outset, we find Categories 2 through 11 unobjectionable under
17 the principles just reviewed, which are the principles that
18 govern the particularity inquiry.

19 I offer this to the Court as an example where the
20 Eleventh Circuit has plainly sanctioned just listing statutes
21 and authorizing agents to seize evidence that it -- seize items
22 that are evidence or fruits thereof.

23 THE COURT: I mean, I think you're generally right.
24 And that's totally correct. I think the submission is that
25 because 793(e) is uniquely maybe more challenging to

1 understand, given the ambiguity and some of the elements, that
2 in this particular context, more description would have been
3 necessary or at least preferable.

4 MR. HARBACH: I understand the argument. And our
5 answer is that -- I mean, I confess I did not look up all of
6 these statutes, but any one of them could be somewhat esoteric
7 and difficult to understand for an agent. And to make
8 Your Honor's point or a variation of the point I think you were
9 suggesting when you were questioning Mr. Bove, it can't be that
10 a search warrant is required to include, you know, a legal
11 brief or a mini dissertation about the elements of offenses in
12 order to make a warrant sufficiently particular.

13 I will also point out that in the -- in the Wuagneux
14 opinion, the Court stated that it was also reasonable -- this
15 is at page 1353: It was also reasonable for the agents to move
16 intact files, books, and folders when a particular document
17 within the files was identified as falling within the scope of
18 the warrant.

19 So this gets to the point about seizure of the boxes
20 and the things around --

21 THE COURT: Uh-huh.

22 MR. HARBACH: -- the classification documents and
23 presidential records. And our view is that if -- if it was
24 proper in this case, Wuagneux, for agents to take surrounding
25 files and folders, even when that wasn't included in the

1 warrant, that it can't be when agents are in possession of a
2 warrant that specifically authorizes surrounding materials to
3 be seized, that -- that the warrant -- that the scope of the
4 warrant was overly broad.

5 I will also direct the Court on this score -- the score
6 of particularity in general, to the Eleventh Circuit --

7 THE COURT: Just curious -- you talked about this, sort
8 of, the periphery. Is that -- what you are referring to as
9 Attachment B, Subsection A?

10 MR. HARBACH: Bear with me one second. Yes. Yes,
11 the --

12 THE COURT: So that refers to any other
13 container/boxes. And so I'm wondering, for example, something
14 like a medical record, why would that have been seized?

15 MR. HARBACH: Well, I'm glad -- I'm glad Your Honor
16 asked that question. It's a fair question.

17 In part, because the warrant -- the warrant authorized
18 the seizure of those -- of those containers. That's the answer
19 to your question. And if those containers happen to include
20 materials that were not the target of the warrant, i.e.,
21 governmental records, presidential records or documents with
22 classification markings, that -- that doesn't render
23 their -- their seizure any less appropriate.

24 As Your Honor will -- will learn at some point, the
25 boxes contained all sorts of things besides those two

1 categories of items. There was nothing inappropriate about the
2 seizure of them. And I will also point out that in connection
3 with the -- this is a brief point. In connection with the
4 filter team's review, materials like medical records and some
5 other items that I confess I don't have off the top of my head,
6 were returned to the defendant, as were the defendant's -- as
7 was the defendant's passport, I think, immediately after the
8 search.

9 THE COURT: Okay. All right. But the catch-all
10 language is located there in Subsection A?

11 MR. HARBACH: Yes, Your Honor.

12 THE COURT: Okay. All right. Anything further?

13 MR. HARBACH: Two -- two more points, and I'm -- I'm
14 going to try to do them efficiently.

15 The other case that I think it would be instructive for
16 Your Honor to -- to digest thoroughly is
17 United States v. Santarelli.

18 THE COURT: If it's cited in your papers, I will digest
19 it. But I want to move along, so -- so reading from the
20 decision, I think, can be done at another time.

21 MR. HARBACH: Very good.

22 THE COURT: If you want to distill the main point, I'm
23 happy to hear it.

24 MR. HARBACH: Well, the main point is that it is -- it
25 is yet another case where, you know, broad language was used to

1 describe what needed to be seized. It's another example of,
2 you know, all property constituting evidence of certain crimes.

3 There is also language in there that -- that also is
4 mentioned in Wuagneux about the flexibility that agents -- that
5 there is a certain amount of flexibility, depending on the
6 case, and so forth; that agents -- that -- such that the
7 description -- this is quoting from the Eleventh Circuit in
8 Wuagneux: A description of the property will be acceptable if
9 it is as specific as the circumstances and nature of activity
10 under investigation permit. Santarelli is of a piece with
11 Wuagneux for both those propositions. And I will move on.

12 The last thing I would like to talk about is the
13 applicability of Leon here, and the extent to which an
14 evidentiary hearing under Leon is required. In the first
15 place, again, just for the record, our position is that the
16 warrant was more than amply particular, both in terms of the
17 description of the property to be searched and the items to be
18 seized. But if the Court were to conclude otherwise, for
19 example, that it was overly broad in terms of the items to be
20 seized, just as an example, then the -- the question is whether
21 the warrant was so facially deficient that the executing
22 officers cannot reasonably presume it to be valid.

23 Again -- and this is the -- this is the main place
24 where they do it. Mr. Trump's argument here is that how the
25 FBI executed the search is important because they did it in an

1 egregious fashion.

2 A couple of comments about that. One, it's false. And
3 I'm going to go through, quickly, their specific allegations
4 about egregiousness. But there was nothing egregious about how
5 the search was conducted at all. Moreover, none of that has
6 anything to do with the appropriate test here, which is the one
7 I just read a moment ago from Leon.

8 So, quickly, the four things they say. We've already
9 talked about the first one, the search of the -- of the
10 bedrooms of Mrs. Trump and the Trumps' son. That was within
11 the scope of the warrant; there was nothing egregious about it.

12 Second, they allege that the agents had no reason to
13 bring firearms into Mar-a-Lago and suggested that that was
14 somehow egregious. These are FBI agents who carry firearms as
15 a matter of course. It's how they're trained. And their
16 possessing firearms, carrying out duties and executing a
17 search, is not remotely egregious; it's -- it's part of
18 protocol.

19 Three, they allege that -- they make this point about
20 improperly seized items, like medical records and so forth.
21 This is not unusual. It happens all the time. And as I said a
22 moment ago, the boxes and their contents, apart from the
23 documents marked classified, and the government and
24 presidential papers were authorized to be seized by the
25 warrant. There was nothing remotely egregious about the fact

1 that there were other types of documents in those boxes.

2 And then finally -- and this is where I think they have
3 spent the most ink trying to justify a hearing -- is this
4 question about whether there was politically motivated animus
5 and their suggestion that that justifies additional discovery.

6 Excuse me.

7 That is wrong -- I'm sorry, Your Honor.

8 That is wrong for the same reason that the
9 egregiousness of the search is out of place here.

10 I will direct Your Honor to the Chief Justice's opinion
11 in Herring which Mr. Bove mentioned, but he did not mention
12 what we think is the most important part of it, which is that
13 the pertinent analysis of deterrence and culpability that he
14 mentioned is an objective one.

15 I will also specifically point out to the Court a
16 little bit of language from that opinion. At page 701, the
17 Chief Justice writes: We, perhaps confusingly, have called
18 this objectively reasonable reliance good faith.

19 I will come in reading the entire opinion to
20 Your Honor, because it clarifies lots of things, not least what
21 the appropriate standard is. But one of the key pages is
22 page 703 of the opinion, and that's from the Supreme Court
23 Reporter, 129 S.Ct. 695 at 703, in which it says: The
24 pertinent analysis of deterrence and culpability is objective,
25 not an inquiry into the subjective awareness of arresting

1 officers.

2 And then they say: We have already held that our good
3 faith inquiry is confined to the objectively ascertainable
4 question whether a reasonably well-trained officer would have
5 known that the search was illegal in light of all of the
6 circumstances.

7 And they do say: These circumstances frequently
8 include a particular officer's knowledge and experience, but
9 that does not make the test any more subjective than the one
10 for probable cause, which looks to an officer's knowledge and
11 experience but not his subjective intent.

12 So why does all that matter? All that matters because
13 there is nothing about any of the other extraneous allegations
14 about how the search was executed, or the allegations of
15 official animus. None of that bears on the question for the
16 Court under the rubric in which they have challenged the
17 warrant, which is the particularity of the language.

18 THE COURT: All right. Thank you very much.

19 Rebuttal.

20 MR. HARBACH: May I --

21 THE COURT: I'm all set. Thank you, Mr. Harbach.

22 You will have a few minutes, Mr. Bove, and then we will
23 be in recess.

24 MR. BOVE: Thank you, Judge.

25 Just to clarify, the six bulleted locations, we don't

1 concede that there was probable cause for those either. My
2 point is just that, with respect to those locations, there is
3 at least references to them in the warrant application. That's
4 all.

5 THE COURT: Okay.

6 MR. BOVE: That's all that I meant.

7 Point two, the Wuagneux case, Your Honor. The
8 Eleventh Circuit there specifically noted that the warrant
9 referenced company names, individuals, and financial
10 transactions. You will see that when you look at -- at
11 footnote 5.

12 That is also the case that is very relevant to the
13 spoliation motion. Because there was language there that
14 authorized the agents to seize something analogous to entire
15 boxes. You will see that in that case, as should be the case
16 here, there was a hearing held regarding the execution of the
17 search, and that the agents testified at that hearing that they
18 did keep the boxes intact, as should have happened here.

19 Point three. In several respects, Mr. Harbach just
20 testified from this podium about the manner in which the search
21 was executed. That's why a hearing is necessary here.
22 Statements like: The agents didn't go everywhere on the
23 property.

24 Says who?

25 There was no rummaging, says Mr. Harbach.

1 Agents carried out their duties professionally,
2 expeditiously.

3 Respectfully, Judge, we disagree. There was nothing
4 egregious about how this search was conducted. The fact that
5 that representation has been made to you, and the fact that we
6 have put forth evidence that is in tension with it requires a
7 hearing.

8 Point four that I would like to make: There was some
9 questions by Your Honor about the public testimony from
10 the -- the FBI assistant director in charge, whose testimony is
11 cited at footnote 3 of our brief. And I think to summarize,
12 Mr. Harbach said, again, in substance: I'm not sure what his
13 communications say.

14 THE COURT: Well, I think the point is that it's
15 just -- really, it's neither here nor there. That at the end
16 of the day, whether a superior or a colleague felt differently
17 or offered a different alternative really doesn't change the
18 fact that this affiant felt otherwise and provided a lengthy
19 affidavit in support of the warrant.

20 MR. BOVE: I understand that Your Honor might reach
21 that conclusion with respect to Franks, but what I wanted to
22 raise was the discovery point. The fact that these
23 prosecutors, for months, have told you that they are in
24 compliance with the Justice Manual and their discovery
25 obligations --

1 THE COURT: Can we just stay focused on this motion,
2 please?

3 MR. BOVE: I am focused, though, Judge, because if
4 there is evidence -- and he testified that there were
5 communications about division in the ranks in the FBI about
6 whether and how this search could be conducted, that's
7 extremely relevant to the factual disputes about this -- that
8 relate to this motion.

9 Finally, in the same way that they cannot make
10 straightforward representations to you about what actually
11 happened in those communications, they cannot make
12 straightforward representations to you about whether and to
13 what extent the communications between these agents reflect
14 animus. If that happened, Judge, that is relevant to the good
15 faith exception. It would be relevant to any agent who
16 testifies here. It would be Giglio material for those agents.

17 So the fact that there is some case law and some
18 tension about whether these standards are objective or not, you
19 don't have, right now, a clear record. You don't have reliable
20 representations from these prosecutors that we have what we're
21 entitled to have.

22 THE COURT: Your challenge is a particularity
23 challenge. And the -- so I look at the face of the affidavit,
24 and I determine if it's particular enough. And it seems like
25 it is, based on the case law that's been submitted. I have a

1 hard time seeing what more language needed to be included in
2 either Attachment A or B.

3 MR. BOVE: Well, I think when you compare the
4 attachment to the attachment that's quoted in the case that
5 they gave you, you will see that there was far more factual
6 detail in that attachment than the one here. My point bears on
7 good faith, though, and that that's an exception that they are
8 invoking, and that they should -- they should not be able to
9 make these representations to you, Judge, without being able to
10 say, we've looked at these communications and run them to
11 ground, and we know what happened here with the agents that
12 we're talking about.

13 THE COURT: Okay. Thank you.

14 MR. BOVE: We appreciate the time today, Judge, and
15 over the last three days. Thank you.

16 THE COURT: All right.

17 MR. HARBACH: Your Honor, may I please respond briefly?

18 THE COURT: Okay, Mr. Harbach, we have had a lengthy
19 hearing. I will give you 30 seconds, please.

20 MR. HARBACH: Thank you, Your Honor.

21 Two things. It's not just some case law. It's an
22 opinion of the Supreme Court authored by a Chief Justice of the
23 United States --

24 THE COURT: I don't want to get into this sort of tit
25 for tat thing. I understand there is an objective test, and I

1 think I'm satisfied.

2 MR. HARBACH: Very good.

3 THE COURT: Anything further?

4 MR. HARBACH: Yes. The last thing I would like to say
5 is that this is part -- this -- this attempt to -- to hijack
6 the hearing and turn it into --

7 THE COURT: There is no hijacking going on. It's about
8 to end, so --

9 MR. HARBACH: There was an attempt to, Judge.

10 THE COURT: No, no, no.

11 Do you have any legal authority you wish to raise or a
12 particular factual point you want to make?

13 MR. HARBACH: I -- I would like to make a factual
14 point --

15 THE COURT: Okay.

16 MR. HARBACH: -- about the tactics of the defense. And
17 I will be brief.

18 THE COURT: What does it concern?

19 MR. HARBACH: It concerns the -- the defense's repeated
20 attempts to use hearings like this to import allegations that
21 have nothing to do with what is before the Court.

22 THE COURT: All right. Thank you. I will be
23 concluding --

24 MR. HARBACH: It's not fair --

25 THE COURT: Thank you. I will be concluding this

1 hearing. I appreciate everybody's assistance. The motion is
2 taken under advisement. Have a nice rest of your week.

3 (These proceedings concluded at 2:38 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate
transcription of the proceedings in the above-entitled matter.

<u>DATE:</u> 06-26-2024	/s/Laura Melton
	LAURA E. MELTON, RMR, CRR, FPR
	Official Court Reporter
	United States District Court
	Southern District of Florida
	Fort Pierce, Florida

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